# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1922.

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## No. 371.

## THE UNITED STATES, APPELLANT.

vs.

## HARRY W. LUSKEY.

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APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims.

HARRY W. LUSKEY
*v.*
THE UNITED STATES. } No. 34,241.

## I. *Petition.*

Filed December 22, 1919.

*To the Honorable the Court of Claims:*

The claimant, Harry W. Luskey, respectfully represents:

I. The claimant was on the 15th day of September, 1915, a chief machinist's mate, United States Navy, and was by orders of the Secretary of the Navy designated for duty involving actual flying in aircraft, including balloons, dirigibles, and aeroplanes, and at once entered upon that duty at the U. S. naval aeronautic station, Pensacola, Florida, and continued on the same duty until February 1, 1917.

II. He was, in accordance with his orders and with the law, paid an increase of fifty per cent (50%) on his pay and allowances during the entire period during which he was on said duty.

At a later date, the amount so paid him for the period from July 1, 1916, to February 1, 1917, amounting to $329, was checked against him and withheld from subsequently accruing pay.

2 III. He made claim at a later date to the Auditor for the Navy Department, for the same and said Auditor for the Navy Department informed him that said claim would be allowed only for the months in which he actually made flights, which ruling of the auditor was based upon decisions of the Comptroller of the Treasury to that effect; whereby it became useless to continue the prosecution of his claim in the Treasury Department and left a suit in this court as his only remedy.

IV. He hereby claims an increase of 50 per cent on his pay and allowances for the period from July 1, 1916, to February 1, 1917, amounting to $329.

V. This claim is based among other statutes upon the act of March 3, 1915 (38 Stat. 939) providing for an increase of 50 per cent of pay and allowances to all officers and enlisted men lawfully detailed for duty involving actual flying in aircraft.

3 No other action has been had on said claim in Congress or by any of the departments; no person other than the claimant is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the claimant has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided,

abetted, or given encouragement to rebellion against the said Government. The claimant is a citizen of the United States. And the claimant claims three hundred and twenty-nine dollars ($329).

KING & KING,
*Attorneys for Claimant.*

DISTRICT OF COLUMBIA *ss:*

George A King, being duly sworn, deposes and says: I am one of the attorneys for the claimant in this case. I have read the above petition, and the matters therein stated are true to the best of my knowledge and belief.

GEORGE A. KING.
(Signature of claimant.)

Subscribed and sworn to before me this 22d day of December, 1919.

[SEAL] MAY LOU H. BYINGTON,
(Official signature.)
*Notary Public, D. C.*
(Official title.)

4 II. *General traverse.*

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by rule 34.

III. *Argument and submission of case.*

On October 31, 1921, this case was argued and submitted on merits by Mr. George A. King, for the plaintiff, and Mr. John G. Ewing for the defendant.

IV. *Findings of fact, conclusion of law and opinion of the Court by Hay, J. Entered November 7, 1921.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

*Findings of fact.*

I.

The plaintiff, Harry W. Luskey, chief machinist's mate, United States Navy, was, by authority of the commanding officer at Pensacola, Florida, confirmed by the Secretary of the Navy, detailed for duty involving actual flying in aircraft Sept. 15, 1915, and continued on that duty until after February 1, 1917. He was on duty at the Navy aeronautic station, Pensacola, Fla., until January 2, 1917, when he was transferred to a ship on aeronautic duty, to wit, to the U. S. S. "Seattle."

During all that time he was under orders detailing him for duty involving actual flying and made actual flights, one of which was in September, 1916, and two others in December, 1916, and was at all times capable of flying if so ordered.

II.

He received 50% additinoal pay allowed him by the act of March 3, 1915, in the sum of $329 for duty involving actual flying in aircraft for the entire period from July 1, 1916, to January 31, 1917, a period of seven months. At a later date the amount was checked against and deducted from his pay. On application to the accounting officers of the Treasury for such pay for that period he was allowed and paid a certain amount for the month of December, 1916.

If entitled to be paid 50% additional pay as chief machinist's mate, U. S. N., for aviation duty for the entire period, July 1, 1916, to January 31, 1917, less pay received for December, 1916, he would receive $279.95.

5 *Conclusion of law.*

Upon the facts found the court concludes, as matter of law, that the plaintiff is entitled to recover. It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of two hundred and seventy-nine dollars and ninety-five cents ($279.95).

*Opinion.*

HAY, Judge, delivered the opinion of the court:

This is a suit brought by an enlisted man of the Navy to recover the sum of $279.95, which he alleges is due him by reason of his having been detailed to duty involving actual flying in aircraft under the provisions of the act of March 3, 1915, 38 Stat. 939, 940. The provisions of that act applicable to this case are: "Hereafter enlisted men of the Navy and Marine Corps, while detailed for duty involving actual flying in aircraft, shall receive the pay, and the permanent additions thereto, including allowances, of their rating and service or rank and service, as the case may be, plus fifty per centum increase thereof."

The plaintiff is an enlisted man and was lawfully detailed "for duty involving actual flying in aircraft." The Congress did not fix the pay on the number of times an enlisted man actually flew, nor on the number of days he was engaged in actual flying, but based it upon the time for which he was detailed necessarily involving him in actual flying. The word "involving" used in the statute may be inept, but its meaning in the connection in which it is used is plain and not to be mistaken, and that is, that the pay is not made dependent upon the number of flights while on such duty, but is made dependent on the detail to such duty. When, therefore, the plaintiff was lawfully detailed to duty involving actual flying in aircraft he must be regarded and treated as entitled to the consequences of such detail and to the pay provided for such duty.

We therefore conclude that when an enlisted man is detailed for duty involving actual flying in aircraft he is entitled to the pay

provided for in the statute during the time he is detailed for such duty from the day of such detail until the detail expires.

Judgment will be entered for the plaintiff in the sum of $279.95. It is so ordered.

GRAHAM, Judge; DOWNEY, Judge; BOOTH, Judge; and CAMPBELL, Chief Justice, concur.

V. *Judgment of the court.*

At a Court of Claims held in the City of Washington on the seventh day of November, A. D., 1921, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises find in favor of the plaintiff, and do order, adjudge, and decree that Harry W. Luskey, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of two hundred and seventy-nine dollars and ninety-five cents ($279.95).

By the COURT.

6 VI. *Proceedings after entry of judgment.*

On January 5, 1922, the defendant filed a motion for a new trial. This motion was overruled by the court January 9, 1922.

VII. *Defendant's application for and the allowance of an appeal.*

From the judgment rendered in the above-entitled cause on the 9th day of January, 1922, in favor of claimant, the defendant, by its Attorney General, on the 4th day of April, 1922, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

ROBERT H. LOVETT,
*Assistant Attorney General.*

Filed April 4, 1922.

Ordered: That the above appeal be allowed as prayed for. April 10, 1922.

By the COURT.

*Clerk's certificate.*

Court of Claims.

HARRY W. LUSKEY
*vs.*
THE UNITED STATES. } No. 34241.

I, F. C. Kleinschmidt, assistant clerk Courts of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the find-

ings of fact, conclusion of law and opinion of the Court by Hay, J.; of the judgment of the court; of the proceedings after the entry of judgment; of the defendant's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this eleventh day of April, A. D., 1922.

[SEAL.]

F. C. KLEINSCHMIDT,
*Assistant Clerk Court of Claims.*

(Indorsed on cover:) File No. 28885. Court of Claims. Term No. 371. The United States, appellant, *vs.* Harry W. Luskey. Filed April 27th, 1922. File No. 28885.

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# Supreme Court of the United States.

October Term, 1922.

THE UNITED STATES, *Appellant*,
*v.*
HARRY W. LUSKEY. } No. 371.

## I. STATEMENT OF THE CASE.

The claim asserted by the claimant and allowed by the Court of Claims was that of a Chief Machinist's Mate (a petty officer, constituting the highest grade of enlisted man) United States Navy, for fifty per cent increase of pay on account of having been detailed for duty involving actual flying in aircraft.

The claim is based upon the following provision of the naval appropriation act of March 3, 1915, chapter 83 (38 Stat. 928, 939):

"Hereafter enlisted men of the Navy or Marine Corps, while detailed for duty involving actual flying in air craft, shall receive the pay, and the permanent additions thereto, including allowances, of their rating and service, or rank and service, as the case may be, plus fifty per centum increase thereof;"

Luskey was by authority of the commanding officer at Pensacola, Florida, confirmed by the Secretary of the Navy, detailed for duty involving actual flying in aircraft September 15, 1915, and continued on that duty until after February 1, 1917. He was on duty at the Navy aeronautic station, Pensacola, Fla., until January 2, 1917, when he was transferred to a ship on aeronautic duty, to wit, to the U. S. S. *Seattle*.

During all that time he was under orders detailing him for duty involving actual flying and made actual flights. During the period covered by this claim, he made one flight in September, 1916, and two others in December, 1916, and was at all times capable of flying if so ordered. (Finding I, rec. foot p. 2.)

He at first received the fifty per cent increase allowed by the act of 1915 for the entire period covered by this claim, July 1, 1916, to January 31, 1917. At a later date the amount was checked against and deducted from his pay.

On application to the accounting officers of the Treasury for such pay for that period he was allowed and paid the increase for the month of December, 1916.

If entitled to be paid fifty per cent increase for the remaining six months of the claim he would receive $279.95. For this sum the Court of Claims awarded him a judgment. (Finding II, rec. top p. 3; conclusion of law.)

The terse but clear opinion of the Court of Claims, occupies less than one page of this record (pp. 3, 4) and is reported 56 C. Cls. 411.

The United States appealed (middle p. 4).

## II. BRIEF OF ARGUMENT.

### Statement of the Question.

The law allows the fifty per cent increase to enlisted men of the Navy "while detailed for duty involving actual flying in air craft." This enlisted man was so detailed. It is true that during the period involved in this claim he made but one actual flight in September, 1916, besides two others in December, 1916, for which latter month the increase has been conceded and paid.

The law does not require that an enlisted man de-

tailed for this duty shall make any particular number of flights or at any particular intervals. It is only that he shall be detailed for that kind of duty.

### The Engard Case.

The question is analogous to that decided in *United States* v. *Engard*, 196 U. S. 511. There an officer on sea duty was ordered to temporary duty in connection with the inspection of certain ship material in the State of Ohio, adding "This duty is in addition to your present duties" (p. 512). He was engaged 122 days on the temporary work in Ohio to which he was assigned. It was therefore asserted by the United States that for that period he was entitled only to shore pay, which, under the law then in force, was lower than sea pay.

The court in an opinion by Mr. Justice White, afterwards Chief Justice, said (pp. 515, 516):

"In the present case it can not be denied that the officer was assigned to sea duty and that the order of the Department, instead of detaching him therefrom, simply ordered him to discharge a temporary service ashore in addition to his sea service. The whole contention of the Government is that this temporary shore service was necessarily incompatible with the continued performance of the officer's duty on the ship to which he continued to be attached, and therefore that the shore duty was paramount to the sea service, and necessarily by operation of law affected the detachment of the officer so as to permanently relieve him from the sea duty to which he continued to be regularly assigned.

"There is no finding in the record, however, which justifies this argument, and as urged at bar it rests upon the mere assumption of the incompatibility between the sea duty to which the officer was regularly assigned and the temporary shore duty which he was called upon by the Department to discharge. In effect, the proposition is that it must be assumed as a

matter of law, in the absence of a finding to that effect, that the temporary shore duty was of such a permanent character as to render it impossible for the officer to continue to perform duty under his permanent sea assignment, and, therefore, as a matter of law caused such an assignment to terminate. We think the converse is true, and that where the assignment of an officer to duty by the Navy Department expressly imposed upon him the continued discharge of his sea duties and qualified the shore duty as merely temporary and ancillary to the regular sea duty, that the presumption is that the shore duty was temporary, and did not operate to interfere with or discharge the officer from the responsibilities of his sea duty to which he was regularly assigned."

"DETAILED" DEFINED.

Other constructions of this word "detailed" when used in a similar connection are contained in several departmental decisions.

In 15 Comp. Dec. 894, construction was placed upon a general order providing that "any enlisted man of the Navy detailed to perform the duties of ship's tailor * * * shall receive $20 per month in addition to the monthly pay of his rating." It was held that an enlisted man, so long as detailed for that purpose, was entitled to the additional pay, even though absent on leave. Reference was made (15 Comp. Dec. 895) to another decision as follows:

"General Order No. 178, November 29, 1904, of the Navy Department, provides:

'Ordinary seamen detailed as jacks-of-the-dust or as lamplighters shall receive $5 per month in addition to their pay.'

In 34 MS. Comp. Dec. 563 (Memoranda Bureau Supplies and Accounts No. 54, pp. 585, 586) August 17, 1905, referring to said General Order No. 178, it was said:

'To entitle an ordinary seaman to additional pay under this executive order I am of opinion that it is sufficient if the detail is made, and he is entitled to the pay so long as the detail continues, even though on leave. In other words, it is dependent upon the detail rather than upon the service.'"

A decision of December 1, 1910 (Memoranda Bureau Supplies and Accounts, No. 117, p. 1617) construed an executive order:

"Chief petty officers detailed as instructors of apprentice seamen * * * shall receive hereafter in addition to their pay the sum of $10 per month, while so detailed," etc.

The Comptroller said (p. 1618):

"The President may fix the pay upon such conditions and under such limitations as he may see fit to impose. By the Executive Order of November 27, 1906, he authorizes additional pay to the petty officers detailed as instructors of apprentice seaman at $10 per month 'while so detailed.' The language is clear and unambiguous and entitles the said petty officers to the additional pay while the detail is in effect. I am of opinion, therefore that you are authorized to pay the petty officers you refer to the additional pay for the time while they were on leave and also while absent undergoing examination for promotion to warrant officers, provided the details were unrevoked and details of other instructors were not made to supply their places while absent. See 15 Comp. Dec. 894, and decision of this office of August 17, 1905 (34 Comp. MS. Dec. 563; Pm. Memo. No. 54)."

## Official Letters and Reports.

These decisions are very strongly emphasized by a consideration of grounds assigned in official statements as to the object of such provisions.

The Secretary of War in advocating similar legislation for the Army officially informed Congress August 30, 1912, Senate Report No. 1174, 62d Congress, 3d Session (p. 2):

"It has been recently brought to my attention that insurance companies have, as a rule, canceled the policies of officers engaged in aviation, and that the general policy of these companies throughout the country is to refuse insurance to any aviator. Thus it appears that the officers engaged in this very hazardous class of duty are not only subject to great personal risk, but also lose the benefits of any insurance which they may have."

These reasons apply to officers under detail for aviation duty with quite as much force as they do to those constantly engaged in flying.

The Secretary of the Navy in a communication addressed to the Speaker of the House, February 21, 1918, House Doc. No. 957, 65th Cong. 2d Session, says (pp. 2, 3):

"One of the strong arguments always advanced for the necessity of increased pay for those assigned to flying was the fact that such detail prevented them from obtaining life insurance from civil insurance companies, except at almost prohibitive rates, if indeed it could be procured at all. The weight of this argument has been greatly lessened since the enactment of the so-called soldiers' and sailors' insurance act of October 6, 1917, which provides for insurance by the Government, applicable to all officers and men on active duty, including those assigned to flying duties."

This passage only reiterates the grounds originally advanced in favor of an increase in the compensation of aviators, to-wit, that it was impossible for them to get favorable rates for insurance while under detail for

aviation duty, under which they were liable to be ordered to make flights at any time.

Congress thereupon (at a date subsequent to that at which this claim accrued) provided in the naval appropriation act of July 1, 1918, Chapter 114 (40 Stat. 718):

"That hereafter the allowances of officers, enlisted men, and student flyers of the naval service shall in no case be increased by reason of the performance of aviation duty."

This act took away increased allowances (as distinguished from pay proper) for aviation duty of officers and enlisted men, etc., of the Navy

OTHER LEGISLATION AND ORDERS.

General Order #205, Navy Department, April 12, 1916 (brief for United States, pp. 7, 8), was the only existing regulation under the act at the time this claim accrued. It contains nothing which in the least degree militates against this claim. On the contrary, as is stated in the brief for the United States (p. 8) the Navy Department took the position that the detail was conclusive.

The decision of the Comptroller (quoted last half p. 8 and first half p. 9, brief for the United States) changed the practice which had existed for two years since the passage of the act.

The following from the published Memoranda Bureau Supplies and Accounts, Vol. 7, No. 198, p. 4323, is material:

"AVIATION: Payments of additional pay made prior to 1 May, 1917.

"In connection with the decision of the Comptroller of the Treasury, published at page 4226 of Bureau Memoranda 194, the following letter, dated 11 Septem-

ber, 1917, from the Comptroller to the Judge Advocate General of the Navy, is published for the information of all concerned:

"I have received your letter of the 7th instant in reference to the decision of this office of April 21, 1917 (23 Comp. Dec. 589), upon the question of the evidence required to substantiate the pay accounts of officers detailed for aviation duty.

"In view of the fact that said decision was one which changed an existing practice of the accounting officers in so far as regards evidence required in making payment to officers detailed to aviation duty, said decision in accordance with the usual practice will not be made retroactive against disbursing officers of the Navy or Marine Corps as to payments made by such disbursing officers for periods prior to May 1, 1917, on account of additional pay to officers detailed for duty involving actual flying in aircraft, where the officer was properly detailed to said duty and made a flight or flights under the authority of such detail.

"This will not affect the settlement of a claim by any officer when presented to the Auditor for the Navy Department, any such claim to be settled upon the facts developed and the law applicable thereto."

As the payments in this case all antedated the date (May 1, 1917), stated in this ruling or order of the Comptroller they should not have been deducted from the claimant's pay.

General Order No. 377, March 14, 1918 (brief for the United States, pp. 9, 10), can not control this case as it was made more than a year after the last date covered by this claim.

### Army Law and Decision.

The Army act of July 18, 1914, Chapter 186, Sec. 3 (38 Stat. 514–516), is quoted in the brief for the United States (pp. 10, 11).

The Judge Advocate General did, indeed (brief for United States, p. 12), give an opinion in response to a request of the Acting Chief Signal Officer. The language quoted (p. 12) is that of the Signal Officer in submitting the question. This opinion of the Judge Advocate General can only be understood by reading the entire opinion, which we give as an appendix to this brief, *post*, pp. 11, 12. The act of March 2, 1913, Chapter 93 (37 Stat. 704, 705), on this same subject was there held to be in force as consistent with later legislation. The material portion of that act (37 Stat. 705) follows:

"*Provided further,* That from and after the passage and approval of this Act the pay and allowances that are now or may be hereafter fixed by law for officers of the Regular Army shall be increased thirty-five per centum for such officers as are now or may be hereafter detailed by the Secretary of War on aviation duty: *Provided,* That this increase of pay and allowances shall be given to such officers only as are actual flyers of heavier than air craft, and while so detailed."

The construction of the law by the Judge Advocate General of the Army is the same as that here contended for in regard to the aviation provisions of the navy law. The Judge Advocate General says (*post*, p. 12):

"The detail recommended would, I think, be within the purpose of the law, which is to provide increase of pay for an officer who incurs the risk under proper detail on aviation duty as an actual flier of heavier-than-air craft."

## Conclusion.

We have not argued the question whether assuming that payments to an enlisted man have been made on a mistaken construction of the statute they could properly

be charged against his subsequently accruing pay. The Attorney General in 1896 decided that they could not (21 Opns. 323). For this conclusion several decisions of this court might be cited: *United States* v. *Freeman*, 3 Howard, 556, 564; *United States* v. *Hill*, 120 U. S. 169, 182; *Badeau* v. *United States*, 130 U. S. 439, 452; *United States* v. *Alabama Railroad Company*, 142 U. S. 615, 621.

It is enough that a statute passed in 1915 is shown to have been intended by Congress to allow the aviation increase for just such services as are here claimed; that that construction was for two years acted upon by the Navy Department and the accounting officers as the only one in accordance with the reasonable and ordinary meaning of the words used by Congress; that only in 1917, after all these services had been performed, was a different construction placed upon it; and that even then that construction was declared not to be retroactive.

The judgment of the Court of Claims should be affirmed.

GEORGE A. KING,
WILLIAM B. KING,
GEORGE R. SHIELDS,
*Attorneys for Appellee.*

## APPENDIX.

WAR DEPARTMENT,
J. A. G. O.,
October 9, 1915.

TO THE ADJUTANT GENERAL:

1. The views of this office are desired with reference to the request of the acting chief signal officer, October 4, 1915, that 1st Lieutenant C. C. Culver, 3d Cavalry, be detailed by the Secretary of War *on aviation duty* under the act of Congress approved March 2, 1913 (37 Stat. 705), for the purpose of developing a suitable system of radio communication from aeroplanes. In submitting the request the acting chief signal officer says:

"In order that Lieut. Culver may intelligently conduct his experiments it is necessary for him to fly during the period of the development of the apparatus. While flying Lieut. Culver is subject to the same risks as any officer now on flying duty and should, it is believed, receive while on duty which requires him to participate regularly and frequently in aerial flights the same compensation to cover the extra hazard as is paid to the other officers on similar duty. * * * Lieut. Culver is at present voluntarily flying without any compensation, as he has found it necessary to do so in connection with the duty ordered under paragraph 22, S. O. 192, W. D. August 18, 1915," *i. e.*, the order detailing him for the duty stated above.

2. It was held by this office in an opinion dated July 30th that the act of March 2, 1913, *supra*, was not repealed by the later act of July 18, 1914, providing for an aviation organization within the Signal Corps; and this view received the informal approval of the Comptroller. As stated by the acting Chief Signal Officer,

Lieut. Culver, while flying, is subject to the same risks as an officer regularly detailed for the purpose of qualifying as an aviator; and the detail recommended would, I think, be within the purpose of the law, which is to provide increase of pay for an officer who incurs the risk under proper detail on aviation duty as an actual flier of heavier-than-air craft. The purpose for which he is detailed is connected with the efficiency of the aviation service, and in order to effectively perform this duty it is necessary for him to incur the risk of an actual flier of heavier-than-air craft. I do not think that the statute should be construed to provide only for those who are detailed with a view to their qualifying as an actual flier of heavier-than-air craft, but that it would be the fair intent of the law to make the detail on aviation duty for the purpose now under consideration.

E. H. CROWDER,
*Judge Advocate General.*

Approved: By order of the Secretary of War.

H. L. SCOTT,
*Major General, Chief of Staff.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1922.

UNITED STATES OF AMERICA, APPELLANT,
*v.*
HARRY W. LUSKEY. } No. 371.

APPEAL FROM THE COURT OF CLAIMS.

## BRIEF ON BEHALF OF THE UNITED STATES.

### STATEMENT OF THE CASE.

The petition in this case alleges in substance that the claimant, a chief machinist's mate, was, on the 15th day of September, 1915, designated by the Secretary of the Navy for duty involving actual flying in aircraft, including balloons, dirigibles, and aeroplanes, and at once entered upon that duty and continued therein until February 1, 1917; that he was paid an increase of 50 per cent over his former pay during the entire period he was on such duty; that subsequently the increase paid him from July 1, 1916, to February 1, 1917, amounting to $329, was checked against him and withheld from pay subsequently accruing; that thereafter he made a claim to the Auditor for the Navy Department, and was informed

that he would be allowed the extra pay only for the months in which he actually made flights; and the petition was filed to recover the extra pay of 50 per cent disallowed from July 1, 1916, to February 1, 1917 (R. 1, 2).

The Court of Claims found that the petitioner was detailed for duty involving actual flying in aircraft from September 15, 1915, to February 1, 1917; that "*during all that time he was under orders detailing him for duty involving actual flying, and made actual flights, one of which was in September, 1916, and two others in December, 1916, and was at all times capable of flying if so ordered*"; that he received 50 per cent additional pay in the sum of $329 for duty involving actual flying in aircraft from July 1, 1916, to January 31, 1917, a period of seven months; that at a later date the amount was checked against and deducted from his pay, but that on application to the accounting officers he was allowed and paid a certain amount for the month of December, 1916, and that if entitled to be paid 50 per cent additional pay as chief machinist's mate, U. S. N., during that period, less pay received for December, 1916, he should receive $279.95; and the court held that he was entitled to the amount stated (R. 2, 3). The reason for so holding was thus stated by the court:

> The plaintiff is an enlisted man and was lawfully detailed "for duty involving actual flying in aircraft." The Congress did not fix the pay on the number of times an enlisted man actually flew, nor on the number of days

he was engaged in actual flying, but based it upon the time for which he was detailed necessarily involving him in actual flying. The word "involving" used in the statute may be inept, but its meaning in the connection in which it is used is plain and not to be mistaken, and that is, that the pay is not made dependent upon the number of flights while on such duty, but is made dependent on the detail to such duty. When, therefore, the plaintiff was lawfully detailed to duty involving actual flying in aircraft he must be regarded and treated as entitled to the consequences of such detail and to the pay provided for such duty. (R. 3.)

STATUTE.

The claim is based upon the provisions of the Act of March 3, 1915, Ch. 83, 38 Stat. 939, which read as follows:

> Hereafter officers of the Navy and Marine Corps appointed student naval aviators, *while lawfully detailed for duty involving actual flying* in aircraft, including balloons, dirigibles, and aeroplanes, shall receive the pay and allowances of their rank and service plus thirty-five per centum increase thereof; and those officers who have heretofore qualified, or may hereafter qualify, as naval aviators, under such rules and regulations as have been or may be prescribed by the Secretary of the Navy, shall, *while lawfully detailed for duty involving actual flying* in aircraft receive the pay and allowances of their

rank and service plus fifty per centum increase thereof. Hereafter enlisted men of the Navy or Marine Corps, *while detailed for duty involving actual flying* in aircraft, shall receive the pay, and the permanent additions thereto, including allowances, of their rating and service, or rank and service, as the case may be, plus fifty per centum increase thereof: *Provided*, That not more than a yearly average of forty-eight officers and ninety-six enlisted men of the Navy, and twelve officers and twenty-four enlisted men of the Marine Corps, detailed for duty involving actual flying in aircraft, shall receive any increase in pay while on duty involving actual flying in aircraft, nor shall any officer in the Navy senior in rank to commander, nor any officer in the Marine Corps senior in rank to major, receive any increase in pay or allowances by reason of such detail or duty.

In the event of the death of an officer or enlisted man of the Navy or Marine Corps from wounds or disease, the result of an aviation accident, not the result of his own misconduct, received *while engaged in actual flying in or in handling aircraft*, the gratuity to be paid under the provisions of the Act approved August twenty-second, nineteen hundred and twelve, entitled "An Act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes," shall be an amount equal to one year's pay at the rate received by such officer or enlisted man at the time of the accident resulting in his death.

In all cases where an officer or enlisted man of the Navy or Marine Corps dies, or where an enlisted man of the Navy or Marine Corps is disabled by reason of any injury received or disease contracted in line of duty, the result of an aviation accident, *received while employed in actual flying in or handling aircraft*, the amount of pension allowed shall be double that authorized to be paid should death or the disability have occurred by reason of an injury received or disease contracted in line of duty, not the result of an aviation accident.

### ASSIGNMENT OF ERRORS.

1. The court erred in holding that the claimant is entitled to recover extra pay for months during which he made no actual flight.

2. The court erred in not construing the statute to mean, that it was necessary to entitle an officer designated to such service to the extra compensation that he be actually engaged in flying, and that, when an unreasonable time elapses during which he makes no actual flight he is not entitled to extra pay for such period.

### ARGUMENT.

The question in the case is whether the right of an officer of the Navy or Marine Corps to the extra pay provided for by the statute arises from *the detail* to a general duty which may or may not require actual flying, or from the specific duty which involves actual flying. In other words, is it *the detail* or *the flying, the possibility of a risk* or *the actual risk,*

that vests the right to the additional pay? Special attention is called to the repeated use of the word "actual" in connection with "flying." That is, the *duty* must involve actual *flying*. The word "duty" as here used manifestly does not include all kinds of work that are incident to a detail of that character, but is limited to the particular duty of flying; and the word "involving" is synonymous with "requiring."

It has been urged in the court below in this and other cases of like character that the fact that the gratuity to be paid under the Act specified for the death of an officer or an enlisted man of the Navy or Marine Corps is to be allowed when the wounds or disease results from an aviation accident received, not from his own misconduct, "while engaged in acts of flying in *or in handling* aircraft," and that the pension paid for the death of an officer or enlisted man of the Navy or Marine Corps from injury received by such officer or enlisted man is to be paid for an accident received "while employed in actual flying in *or in handling* aircraft," indicates that Congress intended that this extra pay should not depend upon actual flying. But do not these express provisions indicate just the contrary? Undoubtedly if the phrase "or in handling" had been omitted, neither the gratuity nor the pension would be payable for any accident which did not occur "while employed in actual flying." But petitioner insists and the Court of Claims holds that the extra pay must be allowed though the claimant may not engage in a

single flight or touch a single aircraft. In fact a case may be cited where an enlisted man was so detailed and was then placed at a desk in the Navy Department and did not see an aviation field during the entire period of the detail. Was it intended by Congress that he should be paid this extra compensation?

Unquestionably the additional pay was allowed because of the *extra risks* incident to the aviation service; and those risks are incident entirely to the *actual flying*, there being no greater risks incident to any other part of such service than there are to the regular Naval or Marine service.

The regulations of the Navy Department upon this subject which were in force during Luskey's detail are embraced in General Order No. 205, dated April 12, 1916, which reads as follows:

FLIGHTS BY NAVAL AVIATORS.

1. Student naval aviators and naval aviators will report to the department, Bureau of Navigation, at the end of each quarter, the number of flights made by them during that quarter.

2. Commanding officers having enlisted men under their command who are detailed for duty involving actual flying in aircraft will report at the end of each quarter the names, ratings, and number of flights made by each of them.

3. In the event of naval aviators being ordered to duty in connection with the aviation service that does not require "flying" as a

> part of that duty, the aviator concerned shall promptly inform the department and the officer having his accounts, in order that additional pay allowed by law for duty involving actual flying in aircraft may cease during the time they are so employed. (Navy Dept. Gen. Orders for 1916.)

It was recognized by this order that the right to the extra pay did not rest upon the *detail*. But it appears that the Navy Department took the position that it alone had the right to determine whether the duty to which an officer had been detailed involved flying in aircraft. And the construction of the statute coming before the Comptroller of the Treasury, he thus expressed his views in an opinion to the Secretary of the Navy given on April 21, 1917 (23 D. C. T. 590–591):

> The statute does not confer a right to the 35 and 50 per cent aviation pay merely by reason of the fact that an order has been issued reciting the fact that an officer or man is detailed to the duty in question. (Act of Mar. 3, 1915, 38 Stat., 939.) The detail it contemplates is the selection or setting apart of an officer or man for a duty "involving actual flying in aircraft." "Involving actual flying in air craft" means including actual flying in air craft as a necessary or logical consequence of the detail. Unless the duty for which the officer is detailed in fact, therefore, includes actual flying in aircraft, the detail is not such a detail as the statute contemplates and the increased pay which it provides does not become payable.

The statute does, therefore, make mandatory actual flying in aircraft by a detailed officer or man as a requisite for the aviation pay it provides for. It does not, however, fix the number of flights or the duration of the flights that the actual flying involved shall include. In the absence of any regulation by you to that effect an officer or man to whom orders of detail had issued and whose flight record is kept by the Bureau of Navigation under G. O. 205, April 12, 1916, showed no flight since the order of detail, or for an unreasonable length of time after order of detail, would not for that time be in fact detailed to duty involving actual flying and would not be entitled to the 35 or 50 per cent aviation pay. As to what would be considered by this office as such an unreasonable time would depend upon the facts in each particular case, and is not a question concerning which I can advise you generally.

Thereafter, on March 14, 1918, the regulations were changed by General Order No. 377 to read as follows:

FLYING REQUIRED UNDER FLIGHT ORDERS.

1. All naval personnel detailed for duty involving actual flying in aircraft shall, while so detailed, make flights in such frequency that at no time shall more than one calendar month intervene between flights.

2. In any case where more than one calendar month shall have intervened without a flight being made, flight orders will be held as

> in abeyance after the expiration of the first successive calendar month and will continue to be held in abeyance until the first of the succeeding month in which a flight is made. The receipt of increase in pay and allowances for duty involving flying will be prohibited during the period in which flight orders are in abeyance.
>
> 3. In the case of individuals failing to perform a flight because of physical disability incident to flying, flight orders during the period of such disability will be considered as fully in effect. (Navy Dept. Gen. Orders for 1918.)

Undoubtedly Congress meant to apply the same rule as to extra pay to an officer of the Navy or Marine Corps assigned to aviation duty as it had applied about seven and a half months before to those detailed for exactly the same duties from the Army. It is helpful, therefore, to consider the language of the statute (Chapter 186, Act of July 18, 1914, Sec. 3, 38 Stat. 515, 516), which authorizes assignments from the Army to the Aviation Section of the Signal Corps. That statute reads as follows:

> Each aviation student authorized by this Act shall, *while on duty that requires him to participate regularly and frequently in aerial flights*, receive an increase of 25 per centum in the pay of his grade and length of service under his line commission. Each duly qualified junior military aviator shall, while so serving, have the rank, pay, and allowances of

one grade higher than that held by him under his line commission, provided that his rank under said commission be not higher than that of first lieutenant, and *while on duty, requiring him to participate regularly and frequently in aerial flights*, he shall receive in addition an increase of 50 per centum in the pay of his grade and length of service under his line commission. The rating of military aviator shall not be hereafter conferred upon or held by any person except as hereinafter provided, and the number of officers with that rating shall at no time exceed fifteen. Each military aviator who shall hereafter have duly qualified as such under the provisions of this Act shall, while so serving, have the rank, pay, and allowances of one grade higher than that held by him under his line commission, provided that his rank under said commission be not higher than that of first lieutenant, and, *while on duty requiring him to participate regularly and frequently in aerial flights*, he shall receive in addition an increase of 75 per centum of the pay of his grade and length of service under his line commission.

There can be no doubt about the meaning of the language here used. The duty is measured or defined by what the one detailed actually does. If he participates regularly and frequently in aerial flights, he is assigned to the duty which entitles him to the pay; if he does not so participate he is not assigned to such duty and does not receive the extra pay. The two acts were reported from different committees,

but when the committee reporting the Naval act used the expression "duty involving actual flying in aircraft," etc., they undoubtedly meant exactly the same thing that was meant by the other committee when it used the language "duty that requires him to participate regularly and frequently in aerial flights." What the judicial officer of the War Department construed the language used in the act relating to the Army to mean appears from the following language used in a communication addressed to the Adjutant General by Judge Advocate General Crowder on October 9, 1915, in response to a request of the acting chief signal officer for an expression of opinion as to whether an officer detailed for the purpose of developing a suitable system of radio communication from airplanes would be entitled to extra pay:

> "In order that Lieut. Culver may intelligently conduct his experiments it is necessary for him to fly during the period of the development of the apparatus. While flying Lieut. Culver is subject to the same risks as any officer now on flying duty and should, it is believed, receive while on duty *which requires him to participate regularly and frequently in aerial flights* the same compensation to cover the extra hazard as is paid to the other officers on similar duty." (Unpublished Op. J. A. G. Oct. 9, 1915.)

A like construction was placed upon this provision by the Comptroller of the Treasury on an appeal by an officer who had been required to refund $150.16

paid him as extra compensation while on detail to the Aviation Section but on leave of absence. The Comptroller said:

> The above act of July 18, 1914, provides for the detail of officers of the Army to the aviation section created by said act for aviation duty, and grants an increase of 50 per cent in the pay of their grade under their line commission "while on duty," requiring them to participate regularly and frequently in aerial flights.
>
> Under the provisions of said statute it is not sufficient that an officer be merely detailed on aviation duty to entitle him to the increase of 50 per cent pay provided for in the act, but he must perform duty as well. The right to said increased pay is dependent upon *duty* rather than upon *detail*. The higher or increased pay is for aviation duty, requiring regular and frequent participation in aerial flights, and unless duty is rendered I do not think the right to the higher pay is earned. (22 D. C. T. 142, 143.)

It has also been urged in this class of cases in the court below that one consideration which induced Congress to pay this extra compensation was the fact that those detailed to aviation service could not secure insurance. But this representation is wholly unfounded. The only reference to the matter is found in the last sentence under the head "Pay of Aviators" of the report of the committee which accompanied the bill (House Reports., Vol. 1,

63rd Cong., 3rd Ses., page 11 of Rep. No. 1287). That sentence reads: "As officers and men engaged in aviation are unable to obtain life insurance, *the pension allowed is double that authorized to be paid in other cases.*" This not only shows that the inability to obtain insurance was not a consideration for the *extra pay, but conclusively shows why a difference was made between the conditions authorizing an increase in pay and those authorizing an increase in the guarantee and pension.*

If the construction of the statute as contended for by the petitioner is the true one the finding of the Court of Claims that "During all that time he (Luskey) was under orders detailing him for duty involving actual flying and made actual flights, one of which was in September, 1916, and two others in December, 1916, and was at all times capable of flying if so ordered" is sufficient. But if the Government's contention is correct it is not sufficient. The fact that he was at all times *capable* of flying is rather adverse to petitioner than favorable, as it shows that the failure to fly did not arise from sickness or other disability, but because *the duty of the detail* did not require regular flying. The only actual flights found were, one in September and two in December, 1916; and the question is whether these three flights entitled petitioner to the extra pay from July 1, 1916, to January 31, 1917. As those detailed are paid monthly, it is reasonable, we insist, that the claimant should actually fly within the month; or rather

that the duty should require him to fly during the month. If unable to do so because of disability the excuse would be valid, as the requirement of the duty would still exist.

JAMES M. BECK,
*Solicitor General.*

JAMES A. FOWLER,
*Special Assistant to the Attorney General.*

MARCH, 1923.

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## UNITED STATES *v.* LUSKEY.

APPEAL FROM THE COURT OF CLAIMS.

No. 371. Argued April 10, 1923.—Decided April 16, 1923.

The additional pay provided by the Act of March 3, 1915, c. 83, 38 Stat. 928, for enlisted men in the Navy and Marine Corps "while lawfully detailed for duty involving actual flying in air craft," goes to the person so detailed irrespective of the number of flights made by him. P. 64.

56 Ct. Clms. 411, affirmed.

APPEAL from a judgment of the Court of Claims awarding a sum as extra pay to a machinist's mate in the Navy.

*Mr. James A. Fowler*, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

*Mr. George A. King*, with whom *Mr. William B. King* and *Mr. George R. Shields* were on the brief, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

The findings of fact of the Court of Claims are in substance, these: (1) Luskey was a machinist's mate in the Navy. He was by proper authority detailed for duty involving actual flying in aircraft, September 15, 1915, and continued in that duty until after February 1, 1917. He made actual flights, one of which was in September, 1916, and two others in December, 1916, and was at all times capable of flying if so ordered. (2) He received the sum of $329.00, being 50% additional pay allowed him by the Act of March 3, 1915, c. 83, 38 Stat. 928, for duty involving actual flying for the entire period from July 1, 1916, to January 31, 1917, a period of seven months. At a later period the amount was deducted from his pay. He was paid a certain amount for the month of December, 1916.

If entitled to additional pay for aviation duty for the entire period, July 1, 1916, to January 31, 1917, less pay received for December, 1916, he would receive $279.95.

Upon the facts found, the court concluded "as matter of law" that he was entitled to recover, and "adjudged and ordered that" he "recover of and from the United States the sum of two hundred and seventy-nine dollars and ninety-five cents ($279.95)."

The United States, by this appeal, disputes the conclusion and judgment. Its contention is that "to entitle an officer designated to such service to the extra compensation" he must "be actually engaged in flying, and that, when an unreasonable time elapses during which he makes no actual flight, he is not entitled to extra pay for such period." Expressing its contention in other words, it, in effect, is that it is not the detail but the flying, not the possibility of a risk but the actual risk, that vests the right to the additional pay.

To sustain the contention, emphasis is put upon, and insistence made of, the words of the act (38 Stat. 939) that compensation is awarded to the officer "while lawfully detailed for duty involving actual flying in air craft."

To the contention, and rejecting it, the court replied, after quoting the statute: [1] "The word 'involving,' used in the statute may be inept, but its meaning in the connection in which it is used is plain and not to be mistaken, and that is, that the pay is not made dependent upon the number of flights while on such duty, but is made dependent on the detail to such duty. When, therefore, the plaintiff was lawfully detailed to duty involving flying in

[1] "Hereafter 'enlisted men of the Navy or Marine Corps, while detailed for duty involving actual flying in air craft, shall receive the pay, and the permanent additions thereto, including allowances, of their rating and service or rank and service, as the case may be, plus fifty per centum increase thereof."

aircraft he must be regarded and treated as entitled to the consequences of such detail and to the pay provided for such duty."

We concur in the conclusion and judgment. The meaning of the statute "is plain." If Congress had intended to provide a detail to intermittent duty with intermittent pay, Congress would have specifically so provided, not left repulsion to it the advantage of ambiguity. If it intended to regard "the possibility of a risk or the actual risk" in flying as determination of compensation or as a factor in compensation, as the United States urges, care would have been taken, not, we will say, against its abuse, but against its use putting the officer's life in peril many times a day. If that were reasonable in expectation, the other contention is condemned, that is, that the officer is entitled to compensation only when he engages in flights and for reasonable intervals between them. The contention gives no animation to prepare for the duty and its hazards.

Congress naturally supposed that there would be no detail to aircraft duty unless there was requirement or use for it, and when either ceased, the detail would be revoked, but if made and not revoked, its duration constituted a service for which the officer must keep prepared and to which, therefore, the compensation was by the statute assigned.

*Judgment affirmed.*